

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS L. LEWIS and DEPARTMENT OF VETERANS AFFAIRS,
PERSONNEL DIVISION, North Chicago, Ill.

*Docket No. 96-2200; Submitted on the Record;
Issued September 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on May 26, 1996.

In the present case, the Office has accepted that appellant sustained a cervical contusion, bulging L4-5 disc, post-traumatic arthrosis of the right shoulder with related surgeries in November 1985 and December 1986 and contusion of the left knee. Those conditions resulted from appellant's September 10, 1985 employment injury when he was attacked by a patient. Appellant had preexisting back and neck pain, congenital scoliosis, arthritis of the right shoulder, and degenerative changes in the lumbar spine which originated from an injury he sustained while working for the military in 1973. Appellant stopped working on September 11, 1985 and has not worked since that date. The Office terminated appellant's compensation benefits, by decision dated May 24, 1996, on the grounds that the weight of the medical evidence of record established that appellant had reached preinjury status and no longer suffered from residuals of the September 10, 1985 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

¹ *Patricia M. Mitchell*, 48 ECAB ____ (Docket No. 95-384, issued February 27, 1987); *Patricia A. Keller*, 45 ECAB 278 (1993).

² *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The Office in terminating appellant's compensation benefits relied on the April 19 and August 15, 1995 reports of Richard H. Sidell, a second opinion physician and a Board-certified orthopedic surgeon. In his April 19, 1995 report, Dr. Sidell considered appellant's history of injury, performed a physical examination, and found that cervical, thoracic and lumbosacral x-rays performed in 1993 were normal except for small spurs projecting from the bodies of L4 and L5 anteriorly and laterally. In considering appellant's history of medical treatment, Dr. Sidell noted that appellant had a resection of the distal clavicle to treat a chronic osteoarthritis condition of the joint and approximately one year later in December 1986 had a "re-resection" of the distal right clavicle because of regrowth of the bone. Dr. Sidell stated that there was no mention of any relationship between the October 8, 1985 employment injury [presumably he meant the September 10, 1985 employment injury] and the surgical procedure. He found no objective findings to substantiate any ongoing injury that could be directly attributed to appellant's September 10, 1985 employment injury. Dr. Sidell stated that there was strong evidence that appellant had a chronic preexisting condition and it was most likely that the September 10, 1985 employment injury merely temporarily aggravated the preexisting condition. He also opined that the "surgical procedure was done for an unrelated problem." Dr. Sidell noted that appellant had not worked for 10 years and that he had a poor work history. He opined that it was unlikely appellant would return to work but appellant was not disabled due to the employment accident and could return to work on a restricted basis.

In his August 15, 1995 report, Dr. Sidell performed a physical examination and opined that he could find no permanent partial impairment due to the October 8, 1985 employment injury [presumably September 10, 1985] and the November 12, 1985 surgery. He stated that appellant's physician stated on November 12, 1985 that appellant "essentially had no significant complaints, other than his right shoulder, which was being treated for a preexisting arthritic problem." Dr. Sidell stated that it was evident that, at that time, appellant had "apparently recovered from the injuries that he incurred one month earlier." He also stated that appellant's current complaints of throbbing discomfort in his neck and lower back appeared to be compatible with his complaints stemming from his 1973 injury. In an addendum to his report, Dr. Sidell stated that pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), Table 27, page "3/61," appellant had a 10 percent impairment of the upper right extremity based on the resection arthroplasty of the distal clavicle.

In support of his claim, appellant submitted progress reports dated from November 2, 1976 to February 28, 1996 chronicling treatment primarily of neck and back pain but also miscellaneous conditions such as headaches and stress. The January 15, 1993 hospital note stated that appellant had been taking medication for neck and back pain since 1973 in the Vietnam war.

The Board has duly reviewed the case record and finds that the Office has not met its burden to terminate benefits.

In the present case, in terminating appellant's compensation benefits, the Office relied on Dr. Sidell's April 19 and August 15, 1995 reports in which Dr. Sidell stated that appellant could return to work and had no residuals from his September 10, 1985 employment injury.

Dr. Sidell's reports, however, are based on an erroneous history and are not well rationalized. In his reports, Dr. Sidell indicated that he did not believe appellant's surgery on November 12, 1985 and the follow-up surgery in December 1986 were work related. He opined that appellant had no permanent impairment from his September 10, 1985 employment injury or his November 12, 1985 surgery. In the addendum to his August 15, 1995 report, Dr. Sidell opined that appellant had a 10 percent permanent impairment rating pursuant to the A.M.A., *Guides* (4th ed. 1994) based on the resection arthroplasty of the distal clavicle. Dr. Sidell's reports are based on the erroneous assumption that appellant's surgeries to his shoulder in November 1985 and December 1986 were not related to his September 10, 1985 employment injury. The Office, however, accepted that appellant's surgeries on those dates were related to appellant's September 10, 1985 employment injury. Therefore, Dr. Sidell's reports stating that appellant had no permanent impairment due either to the September 10, 1985 employment injury or November 1985 surgery are based on an erroneous history and cannot constitute the weight of the medical evidence.³ The Office has therefore failed to meet its burden that appellant's disability has ceased or that it is no longer related to his employment.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 24, 1996 is hereby reversed.

Dated, Washington, D.C.
September 10, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

³ See *Mary Lou Barragy*, 46 ECAB 781, 788 (1995); *Gary L. Ward*, 48 ECAB 1014, 1022-23 (1993).